

1 **I. INTRODUCTION**

2 This petition seeks review of the Los Angeles Regional Water Quality Control Board
3 (“Regional Board”) Executive Officer’s April 19, 2016 approval of the North Santa Monica Bay
4 (“NSMB”) Enhanced Watershed Management Program (“EWMP”) prepared by Los Angeles
5 County, the Los Angeles County Flood Control District (“County”), and the City of Malibu
6 (“Malibu”) pursuant to the 2012 Los Angeles County Municipal Separate Storm Sewer System
7 (“MS4”) Permit (NPDES No. CAS 004001) (“MS4 Permit” or “Permit”).

8 Petitioners’ appeal is necessary because the EWMP fails to consider relevant stormwater
9 and non-stormwater data, fails to apply the applicable standards to stormwater discharges, and fails
10 to apply a prohibition on non-stormwater discharges. To protect important aquatic resources,
11 permittees must fully comply with requirements of the EWMP development process and consider
12 all available data. The NSMB EWMP requires particular attention, because it addresses discharges
13 to the Laguna Point to Latigo Point Area of Special Biological Significance (“ASBS 24”). Areas of
14 Special Biological Significance (“ASBS”) are zones with special habitats, species or biological
15 communities— coastal ecosystem jewels. Consequently, the California Water Quality Control
16 Plan, Ocean Waters of California (State Water Resources Control Board, 2012) (“Ocean Plan”)
17 prohibits all discharge of waste to the ASBS—subject to a narrow exception via a State Board
18 resolution—which authorizes discharges only under specific conditions (“ASBS Exception” or
19 “Exception”). Yet the NSMB EWMP effectively ignores the requirements of the Ocean Plan and
20 ASBS Exception for discharges to ASBS 24. The NSMB EWMP fails to protect ASBS 24 and to
21 comply with the MS4 Permit and the ASBS Exception for at least four reasons:

- 22 1) The NSMB EWMP fails to consider stormwater data for discharges to ASBS 24
23 generated by the Permittees;
- 24 2) The NSMB EWMP fails to consider non-stormwater discharge data for ASBS 24
25 generated by the Permittees;
- 26 3) The NSMB EWMP fails to apply ASBS Exception standards to stormwater
27 discharges to ASBS 24; and
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1 discharge or receiving water sampling data, stating that “no MS4 discharge monitoring data were
2 available at the time of this assessment.” NSMB EWMP at 43 (Ex. B). Similarly, the RAA for dry
3 weather discharges considers no data, and instead proposes a screening of outfalls for dry weather
4 discharges to be completed by December of 2017, and starting 180 days later, for the dischargers
5 to “strive to eliminate, divert, or treat significant non-stormwater discharges that are unauthorized
6 and determined to be causing or contributing to RWL/WQBEL exceedances.” *Id.* at 69. Finally,
7 for all ocean discharges, the RAA and EWMP consider and apply the Santa Monica Bay Beaches
8 Bacteria (“SMBBB”) TMDL standards *only*, which does not offer the heightened protections
9 necessary for ASBS 24 as the ASBS standards. *Id.* at ES-7.

10 On August 31, 2015, Petitioners commented on the draft EWMP, pointing out the failure to
11 incorporate ASBS protections and the lack of consideration of existing and available monitoring
12 data. LAWK/NRDC/HTB EWMP Comment Letter (August 31, 2015) at 19-20 (Ex. C). On April
13 7, 2016, the County and Malibu submitted a final EWMP. To address compliance with the Ocean
14 Plan, and its standards and prohibitions for discharges to ASBS 24, the final EWMP merely states
15 that its findings are consistent with a 2014 draft Compliance Plan for discharges to ASBS 24—also
16 generated by the County and Malibu—which concludes that no additional measures are necessary
17 to protect ASBS 24. NSMB EWMP at 6 (Ex. B). The ASBS Compliance Plan (discussed below) is
18 attached to the NSMB EWMP as Appendix D. On April 19, 2016, the Regional Board Executive
19 Officer approved the EWMP, but without addressing any of the ASBS-related deficiencies.
20 Regional Board NSMB EWMP Approval Letter (April 19, 2016) (“Regional Board Approval”)
21 (Ex. D). Specifically responding to Petitioners’ comment that the NSMB EWMP fails to consider
22 ASBS data or ASBS discharge standards, Regional Board staff wrote:

23 Finally, based on review of the draft EWMP, the Los Angeles Water Board determined that
24 applicable water quality standards were referenced and appropriate monitoring data were
25 reviewed, including those data presented in the ASBS Compliance Plan, which as noted
above, is incorporated by reference into the revised EWMP.

26 Response to Written Comments, NSMBCW Draft EWMP, at 29-30 (Regional Board, May 12,
27 2016) (“Response to Comments”) (Ex. E).

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B. ASBS Exception

1. Required Incorporation of Exception Terms into NPDES Permits

State Water Resources Control Board Resolution No. 2012-0012 allows discharges of waste into the ASBS only where:

- a. The discharges are covered under an appropriate authorization to discharge waste to the ASBS, such as an NPDES permit and/or waste discharge requirements;
- b. The authorization incorporates all of the Special Protections, contained in Attachment B to this resolution, which are applicable to the discharge; and
- c. Only storm water and nonpoint source waste discharges by the applicants listed in Attachment A to this resolution are covered by this resolution. All other waste discharges to ASBS are prohibited, unless they are covered by a separate, applicable Ocean Plan exception.

Exception at 3 (Ex. F).

Thus, any NPDES permit, such as the 2012 LA County MS4 Permit, can authorize discharges to the ASBS *but only* where the ASBS Exception requirements are *incorporated* into the NPDES permit terms and requirements.

2. ASBS Exception Standards and Prohibitions

a. Stormwater

The ASBS Exception prohibits discharges of stormwater to the ASBS, unless in compliance with the requirements of the Exception. Specifically, discharge of stormwater is allowed only when:

The discharges:

- (i) Are essential for flood control or slope stability, including roof, landscape, road, and parking lot drainage;
- (ii) Are designed to prevent soil erosion;
- (iii) Occur only during wet weather;
- (iv) Are composed of only storm water runoff.

Discharges composed of storm water runoff shall not alter natural ocean water quality in an ASBS.

Exception at Att. B, A.1.E.

Thus, even where discharges to the ASBS fit into these narrow categories, discharges that alter natural ocean water quality in the ASBS are prohibited. The Exception requires sampling to

1 determine whether natural ocean water quality in the ASBS is being altered by the discharges:

2 If the initial results of post-storm receiving water quality testing indicate
3 levels higher than the 85th percentile threshold of reference water quality data and
4 the pre-storm receiving water levels, then the discharger must re-sample the
5 receiving water pre- and post-storm. If after re-sampling the post-storm levels are
6 still higher than the 85th percentile threshold of reference water quality data and the
pre-storm receiving water levels, for any constituent, then natural ocean water
quality is exceeded.

7 Exception at Att. B, B.3.E.

8 **b. Non-Stormwater Discharges**

9 The Exception does not allow non-stormwater discharges, except for six limited categories
10 of dry weather discharges:

- 11 1) Discharges associated with emergency fire fighting operations.
- 12 2) Foundation and footing drains.
- 13 3) Water from crawl space or basement pumps.
- 14 4) Hillside dewatering.
- 15 5) Naturally occurring groundwater seepage via a storm drain.
- 16 6) Non-anthropogenic flows from naturally occurring stream via a culvert or storm
drain, as long as there are no contributions of anthropogenic runoff.

17 ASBS Exception at Att. B, I.A.1.e.

18 In all events, these authorized non-stormwater discharges cannot cause or contribute to violations
19 of Ocean Plan objectives or contribute to alterations of natural ocean water quality. *Id.* Compliance
20 with the non-stormwater prohibition was required immediately upon adoption of the ASBS
Exception in 2012. *Id.* at Att. B, I.A.3.a.

21 **3. ASBS Compliance Plan and Pollution Prevention Plan¹**

22 The Exception provides six years to achieve compliance with the stormwater discharge
23 prohibitions. Exception at Att. B, I.A.3.e. To implement pollution controls on this compliance
24 schedule, the dischargers had to develop and submit a draft Compliance Plan (“CP”) by September

25 ¹ In their ASBS submissions, the County and Malibu inappropriately divided their plans into
26 Compliance Plans (point source) and Pollution Prevention Plans (non-point source) based on pipe
27 size (18 inches). While all pipes are point sources for purposes of the ASBS Exception and the
28 Clean Water Act, for purposes of this Petition, the Compliance Plan and Pollution Prevention Plan
are referred to collectively as “CP” or “Compliance Plan.”

1 2013. *Id.* at Att. B, A.3.b. The CP must include a strategy to comply with all special conditions,
2 including maintaining natural ocean water quality. *Id.* at Att. B, I.A.3.b; I.A.2, 2.d., and 2.g. The
3 Exception specifically requires that the CP include:

4 BMPs to control storm water runoff discharges (at the end-of-pipe) during a design storm
5 [that] shall be designed to achieve on average:

6 Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the
7 Ocean Plan; or

8 A 90% reduction in pollutant loading during storm events, for the applicant's total
9 discharges.

10 *Id.* at Att. B, I.A.2.d.(1)-(2).

11 Where receiving water monitoring indicates that storm water runoff is causing or
12 contributing to alteration of natural ocean water quality, the County and Malibu are required to
13 submit an additional report within 30 days of receiving the results. Exception at Att. B, I.A.2.h.

14 The report must:

- 15 1) identify the constituents in storm water altering natural water quality and the source
of the constituents;
- 16 2) describe BMPs in place, proposed in SWMPs for future implementation, and any
additional BMPs to prevent alteration of natural water quality; and
- 17 3) provide an implementation schedule.

18 *Id.* at Att. B, I.A.2.d.

19 The CP must describe a time schedule to implement structural controls to meet the special
20 conditions, and ultimately be included in the County and Malibu's EWMP submitted pursuant to
21 the MS4 Permit. Exception at Att. B, I.A.3.b. Further, a CP must "describe the measures by which
22 all non-authorized non-storm water runoff (e.g., dry weather flows) has been eliminated." *Id.* at
23 I.A.2.b. Dischargers were required to submit a final CP by September 2015, and where NPDES
24 permits issued by Regional Boards authorize discharges to the ASBS, the draft and final CPs are
25 subject to approval by the Executive Officer of the Regional Board, and incorporation into those
26 NPDES permits. *Id.* at I.2.

1 **4. LA County and Malibu Draft Compliance Plan Monitoring**

2 **a. Stormwater Discharge Data**

3 After being granted a one-year extension based on the drought, the County and Malibu
4 submitted a draft compliance plan in September 2014 (“Draft CP”). Draft CP, Cover Page (Ex.
5 G.). A copy of the Draft CP is attached to the NSMB EWMP as Appendix D. The Draft CP
6 includes some, but not all of the sampling required by the ASBS Exception. The Draft CP includes
7 sampling to evaluate alteration of natural ocean water quality by discharges to ASBS 24 primarily
8 at one location, S02. Samples at S02 were collected both at the discharge point of a 36 inch storm
9 drain and in the receiving water at Escondido Beach. *Id.* at ES-4. A single discharge event in 2013
10 was sampled at S01, at a 60 inch storm drain at Zuma Beach. S02 was sampled during storm
11 events on February 19 and March 8, 2013, and February 28, 2014. S01 was also sampled on
12 February 28, 2014. *Id.* at 61-70.² Using the analysis required by the ASBS Exception, the Draft
13 CP reports that stormwater discharges from S01 and S02 contributed to alteration of natural ocean
14 water quality for selenium, total PAH, and mercury. *Id.* at 67-69.

15 The County and Malibu also conducted end of pipe monitoring in 2013 and early 2014 at
16 21 outfalls to the ASBS, with smaller outfall samples analyzed for a limited range of constituents.
17 Draft CP at 71-75. In these samples, the County and Malibu reported repeated exceedances of
18 Ocean Plan Instantaneous Maximum limits, including ammonia, cadmium, chromium, copper,
19 lead, nickel, zinc, and high concentrations of PAH, pyrethroids, and TSS. *Id.* Further, the County
20 and Malibu collected and submitted to the State Board end of pipe monitoring data in ASBS 24 as
21 part of their original ASBS Exception application. This data also documented elevated
22 concentrations of copper, chromium, and PAH, and the State Board confirmed exceedances of
23 Ocean Plan standards of these parameters, as well as acute and chronic toxicity, in discharges to
24 ASBS 24. *See Program Final Environmental Impact Report, Exception to the California Ocean*
25 *Plan for ASBS Discharge Prohibition for Storm Water and Non-Point Source Discharges, with*

26 _____
27 ² This sampling scheme itself violates the Exception’s monitoring requirement that three samples
28 must be collected during “each storm season.” *See* Exception Att. B. at IV.B.2.b. February 2013
and February 2014 are different storm seasons. *See also* Ex __ (SWRCB Comment letter)

1 *Special Protections* (State Water Resources Control Board, Feb 21, 2012) (“ASBS Exception
2 EIS”) at 212-228 (Ex. H).

3 **b. Non-Stormwater Discharge Data**

4 Pursuant to ASBS Exception requirements, the County and Malibu conducted inspections
5 for dry weather discharges during January, February, March and April of 2012, and February,
6 March, May and July of 2013. Draft CP at 50-51, Table 3-3 and 3-4 (Ex F.). The County and
7 Malibu inspected 13 outfalls, and observed dry weather discharges on 73³ occasions during these
8 inspections, many of them repeat discharges. Some, but not all, of these discharges are
9 characterized as “Hillside dewatering,” or “Natural stream,” but the plan provides no data to
10 support these characterizations, nor does it categorize any of the discharges as permitted or
11 unpermitted. The Draft CP also distinguishes, without basis, between discharges that land on the
12 beach in ASBS 24, and those that flow to the surf line. *Id.* at 49. The Draft CP proposes no
13 measures beyond existing outreach programs to address these continuing violations of the
14 Exception and Ocean Plan standards—particularly the numerous dry weather flows that the plan
15 reports as not reaching the “surf.” *Id.* Finally, the Draft CP did not propose, and the County and
16 Malibu have not reported any additional inspections or monitoring of dry weather discharges.

17 **c. LA Waterkeeper and State Board Comments**

18 Both citizen stakeholders and the State Board raised concerns about the Draft CP. In
19 January 2015, LA Waterkeeper commented to the State Board on the deficiencies of the Draft CP,
20 and sent courtesy copies to the County and Malibu. LAWK Draft Compliance Plan Comment
21 Letter (January 13, 2015) (“LAWK Draft CP Comment”) (Ex. I). On March 17, 2015, State Board
22 staff commented on the Draft CP. State Board Draft Compliance Plan Comment Letter (March 17,
23 2015) (“State Board Draft CP Comment”) (Ex. J). State Board staff noted alteration of Natural
24 ocean water quality by ASBS discharges, and required additional sampling and a description of
25 structural BMPs to abate the pollution. *Id.* at 1-2. Staff further noted that: the Draft CP’s

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28 ³ This total includes non-stormwater discharges from 10 outfalls that the CP identifies as
“ownership unknown.” CP at 19.

1 distinction between non-stormwater discharges reaching surf and those not reaching surf was
2 irrelevant, and that the Draft CP did not document that non-stormwater discharges would be
3 eliminated, or how measures to eliminate discharges would be maintained over time. Staff required
4 correction to both these gaps. *Id.* at 2-3. Finally, State Board staff required, consistent with the
5 extended ASBS Exception deadline, submission of a Final CP containing the corrections by
6 September 20, 2015. *Id.* at 3.

7 To date no Final CP has been approved by either the Regional Board or State Board. *See*
8 NSMB EWMP at Appendix D; *see also*
9 http://www.waterboards.ca.gov/water_issues/programs/ocean/asbs_general_exception.shtml

10 **II. STANDARD OF REVIEW**

11 Petitioners seek State Board review under both the terms of the MS4 Permit (MS4 Permit at
12 VI.A.6) and California Water Code § 13320, which states, “Upon finding that the action of the
13 regional board, or the failure of the regional board to act, was inappropriate or improper, the state
14 board may direct that the appropriate action be taken by the regional board, refer the matter to any
15 other state agency having jurisdiction, take the appropriate action itself, or take any combination of
16 those actions.” In reviewing the Executive Officer’s action pursuant to either the Permit process or
17 Water Code § 13320, the Board must exercise its independent judgment as to whether the action
18 was reasonable and in order to uphold the action, the Board must find that the action was based on
19 substantial evidence. *See* State Water Resources Control Board, *In the Matter of the Petition of*
20 *Stinnes-Western Chemical Corporation*, September 18, 1986, at 11.

21 Agency actions, such as approval of the EWMP, must be supported by findings. *See*
22 *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection*
23 (2008) 44 Cal. 4th 459, 520-521 (“*EPIC*”) (citing *Topanga Assn. for a Scenic Community v.*
24 *County of Los Angeles*, 11 Cal.3d at 518-522). The record supporting the decision “must set forth
25 findings that bridge the analytical gap between the raw evidence and ultimate decision” to survive
26 a challenge alleging an abuse of discretion. *See Topanga*, 11 Cal.3d at 514-516. Further, findings
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1 must provide “the analytic route [it] traveled from evidence to action” to satisfy this requirement,
2 so as to allow the reviewing court to satisfy its duty to “compare the evidence and ultimate
3 decision to ‘the findings.’” *Id.* at 515. “While the findings need not be ‘extensive or detailed,’
4 ‘mere conclusory findings without reference to the record are inadequate.’” *AGUA*, 210
5 Cal.App.4th at 1281 (citing *EPIC*, 44 Cal.4th at 516-517). Thus, in reviewing the Executive
6 Officer’s approval of the EWMP, the Regional Board, State Board, and Court may not speculate as
7 to the administrative agency’s basis for decision. *Topanga*, 11 Cal.3d at 514-516.

9 **III. ARGUMENT**

10 **A. The RAA and EWMP Fail to Consider Relevant, Available ASBS Stormwater** 11 **Data**

12 The MS4 Permit requires the County and Malibu to assemble all available, relevant
13 subwatershed data collected within the last 10 years. MS4 Permit at 65. If those data meet QA/QC
14 requirements, the County and Malibu must identify those data, and use them in the RAA. *Id.*

15 Since at least 2008, sampling data for metals, PAH, ammonia, and other pollutants have
16 been submitted to the State Board for direct discharges to the ASBS. ASBS Exception EIS at 214.
17 In 2007 through 2008, as part of the Exception application process, the County, Malibu, and State
18 Board collected discharge and receiving water data in ASBS 24. This data included documented
19 exceedances of Ocean Plan standards for chromium and copper. *Id.* at 200-208. In 2013 and 2014,
20 the County and Malibu also sampled 21 MS4 outfalls to the ASBS. Draft CP at 73-75. The County
21 and Malibu reported to the State Board repeated exceedances of Ocean Plan Instantaneous
22 Maximum limits, including ammonia, cadmium, chromium, copper, lead, nickel, zinc, and high
23 concentrations of PAH, pyrethroids, and TSS. *Id.*

24 Yet despite readily available and highly relevant data in the County’s, Malibu’s and State
25 Board’s files, and the 2013 and 2014 stormwater data attached to the NSMB EWMP itself as an
26 appendix, the EWMP states:

27 Stormwater and non-stormwater discharges have not yet been characterized within the
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1 NSMBCW EWMP Area. No MS4 discharge monitoring data were available at the time of
2 this assessment, but discharge characterization will occur as part of the implementation of
3 the CIMP. Since outfall monitoring data from the CIMP were not available at the time of
4 EWMP development, information from regional MS4 land use studies (eg. Los Angeles
County, 2000) and/or TMDL technical reports were used in Section 2.2 for the water body
prioritization.

5 NSMB EWMP at 43.

6 Thus, rather than collecting all of the available and relevant data – or even considering data
7 that the County and Malibu themselves collected and attached to the EWMP – and including those
8 data in the RAA as required by the MS4 Permit, the EWMP simply denies that any such data exist.
9 Instead, the EWMP uses generalized land use data to conduct the RAA. *Id.* Itself a violation of
10 Permit requirements, this self-acknowledged refusal to consider available and highly relevant data
11 not only violates permit requirements but significantly undermines the ability of the RAA and
12 EWMP to protect ASBS 24.

13 Petitioners pointed out the failure to consider relevant and available data in the RAA and
14 EWMP to Regional Board staff in August 2015—yet the Regional Board Executive Officer
15 approved the NSMB EWMP without addressing the issue. In the subsequently issued Response to
16 Comments, Regional Board staff assert that appropriate data “were reviewed,” and the data
17 contained in the ASBS CP were “incorporated by reference” into the NSMB EWMP. Response to
18 Comments at 30 (Ex. E). The express language of the NSMB EWMP itself that *no* stormwater or
19 receiving water data for ASBS 24 were considered in the EWMP assessment directly contradicts
20 the staff claim; moreover, a simple review of the RAA reveals that the data were not considered.
21 NSMB EWMP at 43. Attachment of the CP as an appendix to the NSMB EWMP, and
22 “incorporation by reference,” is not equivalent to consideration of relevant and available data—
23 particularly when the NSMB EWMP states that no such consideration took place. Further,
24 Regional Board staff can point to no evidence in the EWMP or anywhere else that all the discharge
25 and receiving water data for ASBS 24 referenced in the ASBS Exception EIS were considered as
26 part of the NSMB EWMP. Regional Board staff’s “mere conclusory findings without reference
27 to the record,” both contradict the NSMB EWMP itself and fail to provide “the analytic route
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1 traveled from evidence to action.” (*AGUA*, 210 Cal.App.4th at 1281 (citing *EPIC*, 44 Cal.4th at
2 516-517).) The Executive Officer is bound by the unambiguous language of the EWMP when
3 considering whether to approve the document, and cannot rely on counterfactual post hoc
4 assertions that the EWMP considered data that the EWMP itself clearly states that it did not
5 consider. The self-serving statement in the Response to Comments that the EWMP included
6 review of relevant data is blatantly contradicted by the record and thus entitled to no weight. (See,
7 for example, *Scott v. Harris* (2007) 550 U.S. 372, 380 [reversible error to rely on “utterly
8 discredited” assertions].) As such, the Executive Officer acted inappropriately and improperly in
9 approving the NSMB EWMP as the decision was clearly not based on substantial evidence.

10 **B. The RAA and EWMP Fail to Consider ASBS Non-Stormwater Data**

11 As noted above, as part of the ASBS Draft CP monitoring program, the County and Malibu
12 conducted inspections for dry weather discharges during January, February, March and April of
13 2012, and February, March, May and July of 2013 at outfalls to ASBS 24. Draft CP at 50-51,
14 Table 3-3 and 3-4. The County inspected 13 outfalls, and observed dry weather discharges on 73
15 occasions during these inspections, many of them repeat discharges. The Draft CP containing these
16 dry weather inspection data was attached as an appendix to the NSMB EWMP.

17 Despite the considerable effort expended by the County and Malibu on its ASBS dry
18 weather discharge inspections, the NSMB EWMP nowhere mentions or considers the data
19 submitted by the County and Malibu in the Draft CP. In fact, rather than using these data to inform
20 the non-stormwater discharge program, the EWMP proposes to essentially repeat the process
21 conducted pursuant to the ASBS Exception. NSMB EWMP at 65-69. The EWMP proposes to
22 complete its initial screening and source identification of non-stormwater discharges by December
23 28, 2017, to begin monitoring of those outfalls within 90 days of completion of the screening, and
24 to strive to take some action 180 days thereafter. Thus, the NSMB EWMP proposes to delay
25 implementation of any BMPs to address non-stormwater discharges until September 2018 at the
26 soonest—six years after the Exception and the 2012 LA County MS4 Permit were adopted, five
27 years after the County and Malibu submitted data documenting non-stormwater discharges to the
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1 ASBS, and more than two years from now.

2 The failure of the NSMB EWMP to consider the available and relevant data generated by
3 their own non-stormwater discharge survey violates the requirements of the MS4 Permit, creates
4 unnecessary and harmful delays in program implementation, and wastes public resources by using
5 data collection for delay rather than to inform decision-making. Regional Board staff’s conclusory
6 statement in the Response to Comments that appropriate data were considered is contradicted by
7 the NSMB EWMP itself, which considered no existing non-stormwater field data in its analysis. In
8 approving the NSMB EWMP, the Executive Officer acted inappropriately and improperly, and
9 that approval must be overturned.

10 **C. The RAA and EWMP Fail to Utilize Applicable ASBS Stormwater**
11 **Standards**

12 The 2012 LA County MS4 Permit requires that EWMPs “[p]rovide for meeting water
13 quality standards and other CWA obligations by utilizing provisions in the CWA and its
14 implementing regulations, policies and guidance.” MS4 Permit at 49; *see also* 24 (“Pursuant to
15 California Water Code Section 13263(a) the requirements of this Order implement the Ocean
16 Plan.”). Further, the ASBS Exception allows discharges to the ASBS only where the special
17 protections of the ASBS Exception are incorporated into the authorizing NPDES Permit.
18 Exception at 3.

19 For the portion of the NSMB EWMP applicable to ASBS 24, the Ocean Plan standards for
20 stormwater discharges are those set out in the ASBS Exception. They are:

21 Prohibition of Alteration of Natural Water Quality--post-storm receiving water quality
22 with levels higher than the 85th percentile threshold of reference water quality data and
23 the pre-storm receiving water levels. Exception at Att. B, B.3.E; and

24 For CP (incorporation into EWMP, successor to SWMP, mandatory) BMPs sufficient
25 to meet Table B Instantaneous Maximum Water Quality Objectives in Chapter II of the
26 Ocean Plan; *Id.* at I.A.2.d; or

27 For CP (incorporation into EWMP, successor to SWMP, mandatory) BMPs sufficient
28 to achieve a 90% reduction in pollutant loading during storm events, for the applicant’s
total discharges. *Id.*

1 Ocean samples collected by the County and Malibu for the Draft CP confirm that the
2 County and Malibu ASBS stormwater discharges alter natural ocean water quality for at least
3 selenium, total PAH, and mercury. Draft CP at 71-75. Further, outfall samples collected by the
4 County and Malibu demonstrate exceedances of Ocean Plan Chapter II limits for ammonia,
5 cadmium, chromium, copper, lead, nickel, zinc, and high concentrations of PAH, pyrethroids,
6 TSS. *Id.* at 71-75; ASBS Exception EIS at 212-228. Given these documented exceedances, the
7 RAA and resulting NSMB EWMP must consider and apply ASBS Exception standards in order to
8 address these discharges, and to comply with the requirements of the MS4 Permit.

9 Yet the NSMB EWMP nowhere references any of these ASBS standards. In fact, for
10 discharges to the ASBS beaches, the RAA considers and applies the SMBBB TMDL standards
11 *only*. NSMB EWMP at ES-7. SMBBB TMDL standards limit indicator bacteria in the surf zone,
12 apply to all Santa Monica Bay beaches, and are based on an exceedance day determination. While
13 important for public health, the SMBBB TMDL does not achieve the heightened protections
14 required for ASBS – and fails to address the myriad additional pollutants (like metals) being
15 discharged to the ASBS in excess of background levels. Without consideration of these standards
16 in the RAA, the RAA and NSMB EWMP cannot ensure compliance with the Ocean Plan and
17 Exception ASBS standards, nor can BMPs be developed that achieve required compliance.
18 Because the EWMP fails to incorporate the proper standards from the ASBS Exception, there can
19 be no reasonable assurance that the EWMP will meet those standards. And by failing to consider
20 those standards, the EWMP violates the requirements of the MS4 Permit. Moreover, by failing to
21 incorporate those standards into the analysis and resulting program, the EWMP also violates the
22 requirements of the ASBS Exception.

23 Apparently in response to Petitioner’s comments pointing to the lack of ASBS Exception
24 protections, the final NSMB EWMP includes a reference to the Draft CP, and attaches the Draft
25 CP as Appendix D. The EWMP defers to the analysis in the Draft CP, which concluded that no
26 structural BMPs were required. The EWMP’s deferral to the Draft CP fails to meet the
27 requirements of the MS4 Permit and the ASBS Exception for at least three reasons: 1) the Draft
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1 CP is a draft document, and to date, no Final CP has approved by the State or Regional Board; 2)
2 the Draft CP failed to conduct all required sampling, to propose measures to prevent alteration of
3 natural ocean water quality, or to prevent non-stormwater discharges—failures noted by State
4 Board staff; and 3) the MS4 Permit and the ASBS Exception require incorporation of ASBS
5 Exception standards into any NPDES Permit terms independent of the CP.

6 Because the NSMB EWMP fails to apply ASBS Exception protections, it violates the MS4
7 Permit and the ASBS Exception, and the Regional Board Executive Officer’s approval of the
8 NSMB EWMP was an abuse of discretion, inappropriate and improper, not based on substantial
9 evidence, contrary to law, , and thus should be overturned.

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11 **D. The RAA and EWMP Fail to Utilize Applicable ASBS Non-Stormwater**
12 **Standards**

13 The ASBS Exception imposes a prohibition on non-stormwater discharges to ASBS, with
14 certain limited exceptions for firefighting and natural sources. Exception at Att. B, I.A.1.e. No
15 matter what the source, non-stormwater discharges cannot cause or contribute to violations of
16 Ocean Plan objectives or contribute to alterations of natural ocean water quality. *Id.*

17 The EWMP proposes a “semi-quantitative conceptual model” to evaluate non-storm water
18 discharges, using a four part test. NSMB EWMP at 63. Any one of the four elements would
19 establish compliance with the MS4 Permit’s qualified dry weather discharge prohibition. *Id.* at 64-
20 65. As an initial matter, the EWMP screening is inconsistent with the ASBS Exception’s dry
21 weather discharge prohibition, and would permit non-stormwater discharges beyond the six limited
22 categories set out in the ASBS Exception. *Compare* ASBS Exception, Att. B. at I.A.e. and NSMB
23 EWMP at 66-69.

24 Further, element three of the EWMP methodology states:

25 For the Santa Monica Bay Beaches Bacteria TMDL compliance monitoring
26 locations, if the allowed summer-dry and winter-dry singles sample exceedance days have
27 been achieved for four out of the past five years and the last two years, then the existing
28 water quality conditions at this compliance monitoring location are acceptable, and
reasonable assurance is demonstrated. *Id.* at 69.

1 As noted above, while the SMBBB TMDL provides important beach standards, it is not equivalent
2 to ASBS protection. In addition, the evaluation in the EWMP fails to even require strict SMBBB
3 TMDL compliance because the EWMP methodology allows additional exceedances to be deemed
4 acceptable. Finally, the EWMP ultimately commits the County and Malibu only to “strive to
5 eliminate, divert, or treat significant non-stormwater discharges that are unauthorized and
6 determined to be causing or contributing to RWL/WQBEL exceedances”—a standard falling far
7 short of the Exception’s prohibition on non-stormwater discharges. *Id.* at 69. Again, the Executive
8 Officer’s approval of the EWMP without application of the ASBS Exception prohibition on non-
9 stormwater discharges was inappropriate and improper, and not based on substantial evidence. It
10 must therefore be overturned.

11 **IV. REQUEST FOR RELIEF**

12 Petitioners seek an order by the Regional Board to invalidate the Regional Board Executive
13 Officer’s April 19, 2016 final approval of the NSMB EWMP, and an order remanding the matter
14 to the Regional Board with instructions for staff to require compliance with Permit requirements.
15 Further, should the Regional Board deny Petitioners’ request, Petitioners seek an order by the State
16 Board to invalidate the Regional Board’s Executive Officer’s April 19, 2016 final approval of the
17 NSMB EWMP, any approval by the Regional Board thereof, and an order remanding the matter to
18 the Regional Board with instructions for staff to require compliance with Permit requirements.

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20 Respectfully submitted,

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24 Dated: May, 19, 2016

25 _____
26 Daniel Cooper
27 Lawyers for Clean Water, Inc.
28 Attorney for Plaintiff Los Angeles Waterkeeper

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Dated: May 19, 2016

NATURAL RESOURCES DEFENSE COUNCIL, INC.



Becky Hayat

Attorneys for NATURAL RESOURCES
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Dated: May 19, 2016

LOS ANGELES WATERKEEPER



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